United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1893

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE FELDMAN, as Trustee in Bankruptcy of LEASING CONSULTANTS, INCORPORATED, Bankrupt,

Plaintiff-Appellee,

against

FIRST NATIONAL CITY BANK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT FIRST NATIONAL CITY BANK

ZALKIN, RODIN & GOODMAN
Attorneys for Defendant-Appellant
First National City Bank
750 Third Avenue
New York, New York 10017
(212) 682-6900

HENRY LEWIS GOODMAN
Of Counsel

3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE FELDMAN, as Trustee in Bankruptcy of LEASING CONSULTANTS, INCORPORATED, Bankrupt,

Plaintiff-Appellee,

against

FIRST NATIONAL CITY BANK,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT FIRST NATIONAL CITY BANK

Preliminary Statement

This reply brief will respond to selected contentions raised by the Trustee; others not covered in this reply brief, were adequately treated in Citibank's Appellant's Brief and in the briefs of appellant Chase Manhattan Bank, N.A.

1. In Reply to Certain Extra-Record Facts and a New Contention Contained in the Trustee's Statement of the Facts.

The Trustee, by a footnote at page 5 of his brief, has gone completely outside of the Record on Appeal, as well as the *Joint* Appendix. In that footnote, the Trustee claims that subsequent to Citibank's recordation of UCC 1 financing statements against the Bankrupt on December 30th and 31, 1969 with the New York Secretary of State

and the Registrar of the City of New York, Queens County Division, the Bankrupt moved its only place of business from Queens County to Nassau County, prior to the assignments by the Bankrupt to Citibank of the Vieques and True leases. This extra-record allegation of fact is the premise for an entirely new contention of the Trustee nowhere urged below, namely that if the Uniform Commercial Code governs the rights and priorities between Citibank and the Trustee, with respect to the assigned airplane leases, Citibank's recording was inadequate. We respectfully submit that the Trustee may not urge extra-record facts in this manner or introduce a new contention which changes the entire theory of the Trustee's action as contained in his complaint and his cross-motion for summary judgment granted by Judge Bauman below.

In *United States* v. *Anderson,* 481 F. 2d 685 (4th Cir., 1973), the Court of Appeals said (at p. 702, footnote 19):

> ". . . we are disturbed that these affidavits were not a part of the record for appeal; they were merely inserted by counsel for the defendants without notice in their printed brief. *See,* Rule 10, F.R.A.P. Any reference to material not in the agreed record for appeal, much less its inclusion in a brief filed with the Court, is both improper and censurable. We have accordingly taken no notice of these affidavits."

In *Granite City Steel Company* v. *Koppers Company, Inc.,* 419 F. 2d 1289 (7th Cir., 1969), an appellee sought to sustain a dismissal in the District Court upon a new ground raised for the first time on appeal, namely, that the complaint was defective because the plaintiff did not allege that the injury to the employee was proximately caused by the appellee's negligence. The Court of Appeals refused to consider that argument, saying:

> "This point is first raised on appeal. Since a defendant may not raise a new theory or radically shift

ground on appeal, Rumbaugh v. Winifrede RR., 331 F.2d 530 (4th Cir.), cert. denied, 379 U.S. 929, 85 S.Ct. 322, 13 L.Ed. 2d 341 (1964); *cf.* Wagner v. Retail Credit Co., 338 F.2d 598 (7th Cir. 1964); Jones v. Tower Production Co., 120 F.2d 779 (10th Cir. 1941), we do not consider it. Had this now asserted pleading deficiency been raised below, the dispute could have been resolved either by the district judge's rulings or by plaintiff seeking leave to amend the complaint and remedy the defect, if such there be." (at pp. 1290-1291)

While the Trustee's assertion of a new, extra-record fact, and a new theory not urged by him before the District Court, may be properly characterized as a tacit admission by the Trustee of the weakness of his case on appeal, his action in doing so in his appellee's brief is censurable and should not be considered by this Court.

2. In Reply to Point IV of the Trustee's Brief.

The contention by the Trustee that the language of Section 11e of the Bankruptcy Act (11 U.S.C. § 29(e)) supports his position on the limitations suit is wrong. The causes of action asserted by the Trustee against Citibank were neither inherited by him from the Bankrupt nor from actual, existing creditors to whose rights he succeeds. Properly understood, the clause contained in Section 11e (11 U.S.C. § 29(e)) ". . . or within such further period as the Federal or State law may permit . . ." is only applicable to causes of action which the Trustee inherits from the Bankrupt under Sections 70a(5) and 70a(6) (11 U.S.C. § 110(a)(5) and 110(a)(6)) or from actual, existing creditors to whose rights the trustee succeeds by reason of Section 70e(1) (11 U.S.C. § 110(e)(1)).

Recording statutes, whether Federal or State, do not create causes of action. Such statutes establish priorities between competing claimants to property. The recording

provision of the Federal Aviation Act (49 U.S.C. § 1403), does not create a cause of action in favor of the Trustee. Section 70c of the Bankruptcy Act (11 U.S.C. § 110(c)) creates the Trustee's cause of action; therefore, this action is one which arises under the Bankruptcy Act, and, the Trustee should have brought this action within two years from the date of the Bankrupt's adjudication in bankruptcy. He did not do so and is, therefore, time-barred.

None of the cases cited by the Trustee in Point IV of his brief are relevant. The Trustee does not cite a single authority to sustain his contention that the appropriate limitations period for a suit under Section 70c is other than two years from the date of the Bankrupt's adjudication in bankruptcy. He either cites cases arising under Section 70e(1) of the Bankruptcy Act or non-bankruptcy cases where the Federal statute creating the cause of action did not contain its own built in limitations statute. The Bankruptcy Act does contain an explicit statute of limitations for all suits arising under the Act, which are not inherited from the bankrupt or from existing creditors of the bankrupt. That limitation provision is two years from the date of adjudication.

That the Trustee's rights under Section 70c of the Act must be measured by other non-bankruptcy Federal or State law, does not alter the conclusion that this action is one which arises under the Bankruptcy Act. Preference actions under Section 60 of the Act, which are clearly governed by the two-year limitations provisions of Section 11e (*Herget* v. *Central National Bank & Trust Co.*, 324 U.S. 4 (1945)) also incorporate in Section 60a(2) of the Act (11 U.S.C. § 96(a)(2)) State or non-bankruptcy Federal law in determining the time when a transfer is "perfected".

> "It is evident that, under § 60a, the determination of when a transfer is perfected depends almost wholly on state law (using 'state' to include the District of Columbia, and the territories and possessions to which the Act is applicable). A possible exception involves the interpretation of a federal statute pertaining to the perfection of liens of federal judgments or decrees." (*3 Collier on Bankruptcy,* 14th Ed, pp. 957-958.)

Since it cannot be contended that the use of State or non-bankruptcy Federal law in determining when a transfer was perfected for purposes of Section 60 alters the two-year limitations statute contained in Section 11e of the Act, then by parallel reasoning, the need to determine the Trustee's rights as a hypothetical execution or attachment creditor under non-bankruptcy Federal or State law does not alter the nature of the cause of action as one arising under the Bankruptcy Act, or provide any greater period of limitations than two years from the date of adjudication.

The Trustee's attempts to distinguish *Lewis* v. *Manufacturers National Bank of Detroit,* 364 U.S. 603 (1961) must fail. That decision points to agreement with the position of Citibank in the appeal at bar, for the Supreme Court emphasized that the Trustee cannot rely upon the rights of actual or existing creditors of the Bankrupt under Section 70c. Since the Trustee has not pleaded the existence of an actual creditor of the Bankrupt having a provable claim under the Act at the time of the filing of the petition herein, he does not succeed to any greater limitations period, which may have been attendant upon the rights of such actual creditors and is limited by the two-year period provided in Section 11e.

3. In Reply to Points I, II and III of the Trustee's Brief.

In Point I of his brief, the Trustee argues that the assignments of the leases were invalid against the Trustee for failure of recordation with the Federal Aviation Administrator; that the three airplane leases were conditional sales contracts, as defined by the Federal Aviation

Act; that, assuming the leases were true leases, they nevertheless were required to be recorded with the Federal Aviation Administrator; that he, as a hypothetical execution or attachment creditor of the owner of the aircraft is entitled to the protection of Section 1403 of the Federal Aviation Act and; that he has standing under the Federal Aviation Act to invalidate the assignments.

We will deal with the arguments contained in Parts D and E of Point I.

To argue as does the Trustee in Part D of his Point I, that he is a "third person" without actual notice is misleading. He only has the status granted by Section 70c, that of a hypothetical execution or attachment creditor of the Bankrupt as of the date of the petition. Section 70c does not confer upon the Trustee the rights of a hypothetical *bona fide* purchaser or encumbrancer for value. *4A Collier on Bankruptcy,* 14th Ed. ¶ 70.52, pp. 628-633, and cases cited therein. Therefore, the Trustee must show that the Federal Aviation Act protects execution or attachment creditors from unrecorded conveyances and he has failed to make this necessary showing. Conversely, his attempt to rebut Citibank's argument that the recording provisions of the Federal Aviation Act only protect *bona fide* purchasers for value or *bona fide* mortgagees or other contract lienors from unrecorded conveyances for value, fails.

The closest authority which research has disclosed to support Citibank's position is *Marshall* v. *Bardin,* 169 Kan. 534, 220 P. 2d 187 (1950). There, a creditor attached an airplane as the property of L. F. Bardin and Joseph Slager, partners doing business as Central Airport Company. Subsequently, the attaching creditor attached the airplane as property of Central Airparts, Inc. The attachment was based upon claims of the attaching creditor for repairs made on other airplanes. The appellee intervened and claimed title to the airplane under an oral

agreement with Central Airparts, Inc., which had not been recorded with the Federal Aviation Administrator. The Trial Court found that the intervenor appellee was the owner and in possession of the airplane on the dates of both attachments. The issue before the Court was whether the attaching creditor prevailed over the intervenor appellee's unrecorded title to the airplane, under the recording provisions of the Civil Aeronautics Act, 49 U.S.C. § 523(c), subsequently repealed and re-enacted as part of the Federal Aviation Act of 1958, 49 U.S.C. § 1403. (*See 1 Gilmore Security Interests in Personal Property*, p. 422, footnote 1). The Court held that the intervenor appellee, as owner of the aircraft, although under an unrecorded conveyance, prevailed over an attachment creditor of the former owner.

The Court's decision in favor of the intervenor owner was premised upon three grounds. First, the question had been settled under the Federal Ship Mortgage Act, the provisions of which were almost identical with those of the then Civil Aeronautics Act and its replacement statute, the Federal Aviation Act of 1958. Secondly, the Court relied, as Citibank did in its appellant's brief, upon the established doctrine that an attaching creditor acquires no greater right in the attached property than had by the debtor. Third, that the attachment creditor is not a member of the class to be protected by the recording provisions of the predecessor statute to the Federal Aviation Act of 1958, saying:

> "It is well to bear in mind appellant was not a purchaser of this aircraft for value on the strength of the record title. He had acquired no mortgage or other lien on the aircraft in question. The indebtedness of the defendant corporation did not arise out of any dealings appellant had with it in connection with work on this particular airplane. The failure of intervenor to have his title recorded did not defraud

> or mislead appellant in his dealings with the defendant corporation out of which its debt to appellant arose. That debt arose out of work appellant had done on other planes of the defendant corporation. Appellant merely had an attachment levied on this airplane which he might have procured on a truck, automobile, office furniture or any other property of the defendant corporation subject to attachment for the purpose of satisfying the unpaid claim he had against it." (220 P. 2d at p. 190)

The refusal to include attaching creditors as members of the class to be protected under Section 503(c) of the Federal Aviation Act of 1958 (49 U.S.C. § 1403(c)), was reaffirmed by the Supreme Judicial Court of Massachusetts in *Marrs* v. *Barbeau,* —— Mass. ——, 146 N.E.2d 353 (1957). It is noteworthy that the Massachusetts Court reached the same conclusion, without citing *Marshall* v. *Bardin, supra,* which had been decided seven years previously.

The facts in the *Marrs* case are somewhat complex and may best be summarized as follows: Owner 1 conveyed an airplane to Owner 2. The conveyance was unrecorded. A creditor of Owner 2 attached the aircraft. Owner 1 then conveyed the aircraft to Owner 3, the conveyance was recorded; there was some indication that Owner 3 was a nominee of Owner 2. Owner 3 then conveyed the plane to Owner 4, a *bona fide* purchaser for value and without notice, whose conveyance was recorded. The dispute was between Owner 4 and the attaching creditor of Owner 2. The Court held for Owner 4 in large measure upon the basis that attaching creditors are not members of the class to be protected by the recording provisions of the Federal Aviation Act from unrecorded conveyances, saying:

> "Attachments are not mentioned and if they are to be included in the statute it is necessary to say that they

> are tantamount to conveyances. In the absence of a binding decision of the United States Courts—and we have found none—we decline to place such a construction on the statute." (146 N.E. 2d at p. 355)

In the recent decision of *Industrial National Bank of Rhode Island* v. *Butler Aviation International, Inc.*, 370 F. Supp. 1012 (EDNY, 1974), United States District Judge Neaher followed the decision of the Appellate Division of the Superior Court of New Jersey in *Southern Jersey Airways, Inc.* v. *National Bank of Secaucus*, 108 N.J. Super. 369, 261 A. 2d 399 (1970) cited, together with the *Marrs* and *Marshall* cases, *supra*, at pages 22 and 26 of Citibank's appellant's brief.

In the *Butler Aviation* case the dispute was between a bailee in possession of an airplane, who claimed a bailee's possessory lien thereon for storage charges as against a prior recorded security interest in the airplane under the Federal Aviation Act. The secured creditor's position was that the Federal Aviation Act of 1958 preempted the field of aircraft liens and titles and mandated priority for its recorded security interest over a state-created possessory lien (at p. 1015). Judge Neaher, who did not agree with the secured creditor's characterization of the *Southern Jersey Airways* case as an "isolated 'maverick'" (at p. 1016), extensively quoted from the New Jersey Court's decision and considered that it was ". . . a thoughtful, exhaustive, and, ultimately, persuasive analysis of exactly the question presented here." Judge Neaher agreed with the New Jersey Court's view that Congress did not intend to displace and preempt all State law otherwise applicable upon priorities of lien and title interests in aircraft, by means of the recording provisions of the Federal Aviation Act, although Congress had the power to do so.

In *Marsden* v. *Southern Flight Service, Inc.*, 227 F. Supp. 411 (DCNC, 1964), the District Court cited with approval

Marshall v. *Bardin, supra,* for the proposition that:

> "The purpose of the recording provisions of the act is to protect persons who have dealt on the faith of recorded title or aircraft and as to whom it would be a fraud to give effect to unrecorded titles to their detriment, . . ." (at p. 415)

Consequently, despite the Trustee's confusing and unclear arguments contained at pages 13-21 of his brief, it is established by the above cited authorities that the recording provisions of the Federal Aviation Act of 1958, and its predecessor, the Civil Aeronautics Act of 1938, were only intended to protect *bona fide* purchasers or *bona fide* mortgagees or other contract lienors from the effect of unrecorded conveyances of interests in aircraft and not execution or attachment creditors of a former owner, and that those recording provisions were not intended to displace all State law regarding liens and interests in aircraft.

Since the Trustee is not a member of the class to be protected from unrecorded conveyances under the Federal Aviation Act of 1958, and since Section 70c of the Bankruptcy Act only gives him the rights of a member of an unprotected class (i.e., execution or attachment creditor), it is immaterial whether the leases were true leases or conditional sales contracts under the provisions of the Federal Aviation Act. The inquiry then is whether the Trustee can prevail over Citibank under the New York Uniform Commercial Code, either with respect to the airplanes or to the assigned rentals and it is clear that he cannot. Citibank properly filed its financing statements under New York law (A-75, 76). The recorded financing statements and the Loan and Security Agreement dated December 15, 1969 between Citibank and the Bankrupt, granted Citibank as collateral, a security interest in the assigned leases and the property leased (A-60). Citibank's security interests in the leased aircraft and in the assigned

lease rentals were perfected under the New York Uniform Commercial Code against execution or attachment creditors of the Bankrupt.

The airplane leases were chattel paper under the Code, Citibank had both physical possession of the leases and had properly recorded UCC-1 financing statements (A-54, 55). Under the New York Code, security interests in chattel paper are perfected either by filing financing statements (New York Code, Section 9-304(1)) or by possession (New York Code Section 9-305). Citibank both filed and had possession of the chattel paper and, consequently, met the perfection requirements of the New York Code twice-fold.

CONCLUSION

For the reasons set forth above, and in Citibank's Appellant's Brief the judgment appealed from should be reversed on the law and the Trustee's action dismissed in all respects.

Respectfully submitted,

ZALKIN, RODIN & GOODMAN
Attorneys for Defendant-Appellant

HENRY LEWIS GOODMAN
Of Counsel

unknown

Due ~~and timely~~ service of Two copies of the within BRIEF is hereby admitted this 8TH day of NOVEMBER 1974 at 12:15 PM

Attorney for APPELLEE

by